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No. 549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

WALLY KELBERINE and LENKA BERLIN, et al.,
Petitioners,

v.

SOCIETE INTERNATIONALE POUR DES PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. (INTERHANDEL), a corporation organized under the Laws of Switzerland,
Respondent,

and

NICHOLAS KATZENBACH, Attorney General of the United States, and
DOUGLAS DILLON, Secretary of the Treasury of the United States,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 7, 1966. Petitions for Rehearing, filed by petitioners and respondent Interhandel were denied on June 16, 1966.

OPINIONS BELOW

No Opinion was filed by the District Court.

The Opinion of the Court of Appeals, printed in Appendix A hereto *infra*, p. 1a is reported at App. D.C. , F2d .

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1966. Petitions for Rehearing, filed by petitioners and respondent Interhandel were denied on June 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the defense of sovereign immunity to suit is available to respondents Attorney General and Secretary of the Treasury when the Congressional authorization provides for holding the funds in question in trust, "pending the entry of final judgment in such suit" when final judgment has not been entered in such suit, and when Plaintiffs request the Court in Equity to redirect final payment to a trustee for the benefit of the slave labor victims of Defendant Interhandel through its master I. G. Farben, such victims being now citizens of the United States and presenting a Petition for Relief which in no manner and in no degree is adverse to the interests of the United States Government and where petitioners have a personal stake in the funds sought to be distributed.

2. Whether as a prime principle of United States Constitutional Law and of private international law, available to citizens of the United States under the Constitution, if in an area of the world human beings, through private acts which are not acts of state, are illegally forced into slave labor, their properties illegally taken from them, members of their families upon whom they are dependent for suport and care are unlawfully killed, under circum-

stances in which they are then powerless to resist and then unable to obtain redress, can these victimized human beings, upon subsequently becoming citizens of the United States and upon subsequently finding the private wrongdoers and some of their private property within the jurisdiction of the Court of the United States, bring an action for redress for their wrongs against the private wrongdoers and to the extent that they can prove their individual losses, recover pro rata and equitably to the extent of the property of the private wrongdoer available within the jurisdiction of the Court; and further whether the administration of a fund of $60,000,000 under the Court appointed trustee and the receiving of claims of United States citizens who were victims of the wrongdoings of Defendant Interhandel through its master I. G. Farben (such claimants probably numbering as many as 200,000) is too complex and difficult and beyond the powers of the Court and can only be effected through Congressional action, or whether such process of redress is within the inherent and feasible procedures of the Court.

3. Whether the petitioners were deprived of due process under the Fifth Amendment to the United States Constitution by the refusal of the District Court to grant a continuance for the purpose of taking depositions to develop the facts which would show that the actions of payment without final judgment of court, to Interhandel by respondents Katzenbach and Fowler would be beyond their statutory authority and thus subject to the jurisdiction of the Court and not within the sovereign immunity rule.

STATUTE INVOLVED

This case involves the application of Section 9 (a) of the Trading with the Enemy Act, as amended, Pub. L. No. 87-846 § 203, 76 Stat. 1113 (1962) and Amendment V of the Constitution of the United States. They are printed in Appendix B, *infra* p.12a.

STATEMENT

Petitioners in this class action are citizens of the United States and are surviving victims of certain slave labor camps that were constructed, organized and operated by respondent Interhandel, through its master I. G. Farben, during the Second World War. Citizens of Germany and other European countries at that time, the petitioners lost their property to the respondent Interhandel. This is a suit for damages suffered by petitioners at the hands of respondent Interhandel during that period.

On March 9, 1965 the United States Government sold, and on March 17, 1966 delivered, the shares of General Aniline and Film, which it had seized as Enemy Alien Property during World War II and which constituted the principal asset of the respondent Interhandel. Respondent Interhandel's share of the proceeds of the sale were then deposited in an account in the Department of the Treasury. Originally totaling $120,000,000, the funds on deposit now total approximately $60,000,000, the remainder having been released to respondent Interhandel.

On March 16, 1965 petitioners brought this action in the District of Columbia because of respondent Interhandel's business activities in Washington. The theory of the suit is that respondent Interhandel is a tort feasor which inflicted grievous bodily harm upon the petitioners, converted their property and forced them to perform labor as slaves without just compensation.

As an incident to this suit, petitioners requested that the Attorney General and the Secretary of the Treasury not release the funds from the Attorney General's account to the account in the United States Treasury bearing the name of the respondent Interhandel, and that a master or masters be appointed to determine the validity and extent of the claims of petitioners and the members of their class and to make adjudications.

Respondents Attorney General and Secretary of the Treasury moved for dismissal of the Complaint as it related to them contending that this action was in reality

a suit against the United States to which it had not given its consent. The District Court (Jones, J.) granted the motion on April 9, 1965.

The Court of Appeals, in the opinion set out in Appendix A, affirmed the District Court on this point (Prettyman and Miller, Senior Circuit Judges, and Danaher, Circuit Judge).

Respondent Interhandel moved to "quash return of service and/or to dismiss the complaint" on the grounds that respondent Interhandel was not in fact doing business within the District of Columbia and therefore was not subject to service. After extensive depositions, Judge Jones of the District Court granted respondent Interhandel's motion, without Opinion, on April 29, 1965.

The Court of Appeals in its Opinion filed on April 7, 1966 reversed this holding and found that respondent Interhandel was in fact doing business in the District of Columbia and was amenable to service. However, the Court of Appeals found this suit unusual and—without brief or argument on the point—held that to permit these Plaintiffs to recover against respondent Interhandel for wrongs suffered by them would compel the judiciary to enter an area which it should avoid without legislative guidance. The Court of Appeals therefore concluded that the Complaint did not state a cause of action upon which relief could be granted and affirmed the dismissal of the Complaint by the District Court.

Both the petitioners and respondent Interhandel filed timely Petitions for Rehearing and respondent Interhandel also requested a rehearing *en banc*. All of the Petitions were denied on June 16, 1966.

REASONS FOR GRANTING THE WRIT

This case concerns the rights of U.S. citizens who were slave labor victims of respondent Interhandel to recover partial compensation from one of the principal private organizers of—and private profiters from—the Nazi persecutions of the 1930s and the 1940s. Interrelated are

questions involving the development of a World Law and the recognition of the right of victims of aggressive war and private wrongdoers during wartime to receive compensation out of the private assets of the wrongdoer located in the country of which the victims are now citizens.

1. In holding that the Complaint, by victims whose human rights were violated by private wrongdoers, seeking compensation from their assets now located in Washington, D.C. does not state a cause of action upon which relief may be granted, the Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this court.

The theory behind this case is a simple one. The wrongs inflicted upon petitioners in Europe by respondent Interhandel were transitory actions for which compensation may be sought before any Court which has jurisdiction over the parties. Petitioners seek to apply this principle, which is invoked daily before our Courts on tort and contract questions, to secure recovery for their infinitely greater sufferings out of the fund of $120,000,000 created by the sale of the stock of General Aniline and Film Company, the principal asset of the respondent Interhandel. The recognition of this right by the Courts of the United States would constitute a significant first step toward the establishment of an International Rule of Law for the compensation of wrongs suffered at the hands of private wrongdoers by innocent victims of aggressive war, and of private personal enslavement, persecution, and illegal deprivation of property, the wrongdoings not being Acts of State.

The tools necessary for the adjudication of this suit, and the determination of the claims arising thereunder, are provided in our laws. It is unnecessary to seek further legislative guidance as the Court of Appeals suggested. Had either the Court or respondents raised any questions previously as to the need for legislative guidance, petitioners would have demonstrated how these determinations

can be made within our existing legal framework. Should this Petition be granted, petitioners will outline in their briefs the procedures which they will recommend be adopted to determine the rights of the respective petitioners, and of future additional claimants.

2. The Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court in holding that petitioners have no standing to enjoin the unauthorized payments to respondent Interhandel.

Petitioners seek to enjoin the payment of the proceeds of the sale of the General Aniline and Film stock to respondent Interhandel. Petitioners have consistently limited their claim to only that portion of the fund remaining after provision had been made for the claims and indemnities of the United States, arising under the Settlement Agreement. The interest of the petitioners is, of course, that it represents assets out of which the claims will be paid. Injunctive relief was sought principally on the basis that the proposed payment to respondent Interhandel was directly contrary to the express language contained in the statute especially enacted to deal with the disposition of the Interhandel assets.* The Court of Ap-

* The Statute provides for the sale of assets held by the Alien Property Custodian upon determination by the President that such sale would be in the interest of the United States. The Statute later provides that "(t)he net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit." The trial judge in the main case, *Societé Internationale v. McGrath*, Civil Action No. 4360-48, refused to sign the order for Entry of Judgment when it was presented to him. The parties then simply amended their "Settlement Agreement" to call for the funds to pass upon the filing of a praecipe for dismissal, which of course required no judicial approval. Petitioners contend that under the law and these facts, the actions of the Attorney General and the Secretary of the Treasury were *ultra vires* and not entitled to the protection of the sovereign immunity.

peals held that petitioners did not have standing to sue to enjoin the payment, citing *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923).

If left undisturbed, this extension of the *Massachusetts* v. *Mellon* doctrine would deprive petitioners of what they would have had, had the special Internhandel legislation been followed. This requirement that the final entry of judgment be made by the trial judge would have provided these petitioners with the opportunity of coming forward to present their claims. This route was denied them and they have a very special interest in seeing that the procedure spelled out in the Statute be followed.

The distinction between the facts of the present case and those in *Massachusetts* v. *Mellon* is apparent. In the later case, Plaintiff sought to prevent the payment of Federal funds to the States which met certain requirements for welfare programs. It was a taxpayer's suit to test the Constitutionality of the law under which payments were to be made. Mrs. Frothingham's interest was that of a taxpayer and nothing more.

The interests of petitioners in the instant case are much greater. They appear not as citizens seeking to compel government officials to administer according to the law; they have a direct interest in that fund and they look to it for payment of their compensation claims. They have a very real interest that it not be permitted to leave the jurisdiction of the Courts of the United States and be transmitted to Switzerland before their interests are determined—and their interest is all the more real and immediate when one remembers that those who propose to transmit the funds plan to do so without following the procedural safeguards the Congress imposed.

It was urged below, and is implicit in the Opinion of the Court of Appeals, that petitioners must show some sort of a vested interest or equitable lien in the fund in order to have standing to sue. It is respectfully submitted

that this is not the law as enunciated by this Court and that to allow the holding of the Court of Appeals to remain will impose an unnecessary and unwarranted burden upon these and other litigants. While it is true that most of the cases where injunctive relief was sought against a Federal officer to compel him to take, or refrain from, certain actions in regard to property involved property in which the Plaintiffs had legal or equitable interests, the cases do not hold it to be necessary for Plaintiffs to show such an interest. The fact that such interests may be present in most cases should not bar other claims where the interests may not be present in the same form.

The search for legal or equitable interests in the property—which never was a requirement—has little place in modern practice since this Court enunciated the "personal stake" test in *Baker* v. *Carr*, 369 U. S. 186 (1962).

In one of its most recent pronouncements on the subject of standing to sue, this Court has expressed the law in these words:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."
>
> *Baker* v. *Carr*, 369 U. S. 186 (1962).

More recently, in *Abington School District* v. *Schempp*, 374 U. S. 203, 267 (1963), the concept of standing was described as "a necessarily flexible one", citing *Baker* v. *Carr, supra.* (Separate Concurring Opinion of Mr. Justice Douglas.)

It is this necessarily flexible concept which is the appropriate test in this case and it was error for the Court of Appeals to require a showing of an equitable lien.

3. The refusal of the District Court to grant petitioners' motion for continuance for the purpose of taking depositions to establish the facts surrounding respondents Attorney General and Secretary of the Treasury's asserted defense of sovereign immunity constituted denial of due process under the Fifth Amendment to the Constitution of the United States.

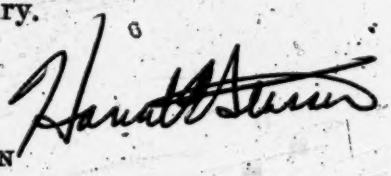
This suit was filed on March 16, 1965 and on March 24 service was made upon the government officers. On April 9, while the petitioners were taking the deposition of Anthony L. Mondello, Deputy Director, Office of Alien Property, Civil Division, Department of Justice, the District Court denied petitioners' motion for a continuance to complete depositions on the question of sovereign immunity and dismissed the Complaint as it related to respondents Attorney General and Secretary of the Treasury.

The proceedings in the District Court on April 9, 1965 (Joint Appendix, pp. 94-102) reveal clearly that the Court viewed the interrelated questions of standing and sovereign immunity as questions of law and foreclosed all attempts to develop the facts on these points through depositions. Full development of the facts is important in determining whether the respondent government officials were in fact exceeding their legislative authority. In a similar fashion, the flexible concept of standing requires that petitioners be given fair opportunity to develop the facts that give meaning to the concept. Neither of these questions can be decided in a factual vacuum. And a factual vacuum is all that can result when not a single continuance for depositions on these points was granted.

CONCLUSION

Wherefore, petitioners pray that a writ of certiorari issue from this honorable Court to review the judgment of the Court of Appeals for the District of Columbia Circuit in Wally Kelberine and Lenka Berlin *et al. v.* Interhandel and Nicholas Katzenbach, Attorney General, and Douglas Dillon, Secretary of the Treasury.

Respectfully submitted,



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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19286

WALLY KELBERINE, et al., APPELLANTS

v.

SOCIETE INTERNATIONALE, Etc., INTERHANDEL, Etc., et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided April 7, 1966

Mr. Harold E. Stassen, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of court, with whom *Mr. John Alvin Croghan* was on the brief, for appellants.

Mr. John J. Wilson, with whom *Mr. Frank H. Strickler* was on the brief, for appellee Societe Internationale, Etc.

Mr. Richard S. Salzman, Attorney, Department of Justice, with whom *Mr. David C. Acheson,* United States

Attorney at the time the brief was filed, and *Mr. Morton Hollander,* Attorney, Department of Justice, were on the brief, for appellees Katzenbach and Fowler. *Mr. Fred W. Drogula,* Attorney, Department of Justice, also entered an appearance for appellees Katzenbach and Fowler.

Before PRETTYMAN and WILBUR K. MILLER, *Senior Circuit Judges,* and DANAHER, *Circuit Judge.*

PRETTYMAN, *Senior Circuit Judge:* This law suit has an antecedent history. In years prior to World War II the appelleee Societe Internationale, Etc.,[1] a Swiss holding corporation, came into ownership of various American properties, including over 90 per cent of the stock of General Aniline and Film Corporation, a Delaware corporation. In 1942 this stock was vested in the Alien Property Custodian, succeeded by the Attorney General of the United States, under the Trading With the Enemy Act.[2] When the war was over, Interhandel in 1948 sued under Section 9(a) of the Act to recover the property. The litigation was extensive.[3] Finally in 1963 the case was settled by an agreement written and filed in the suit.[4] Pursuant to that stipulation the General Aniline stock was sold at public auction, some three hundred twenty-nine million dollars being realized from the sale. The bids were opened March 9, 1965, and the shares delivered March 17, 1965. Interhandel's share of the proceeds was

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[1] Known to this litigation variously as I. G. Chemie and as Interhandel.

[2] 40 STAT. 411 (1917), as amended, 50 U.S.C App. § 1, *et seq.*

[3] See Societe Internationale v. Rogers, 357 U.S. 197 (1958), *reversing* Societe Internationale, Etc. v. Brownell, 100 U.S. App. D.C. 148, 243 F.2d 254 (1957); Societe Internationale, Etc. v. McGranery, 111 F.Supp. 435 (D.D.C. 1953), *aff'd sub nom.* Societe Internationale, Etc. v. Brownell, 96 U.S. App. D.C. 232, 225 F.2d 532 (1955), *cert. denied,* 350 U.S. 937 (1956).

[4] Civil No. 4360 (D.D.C. 1948).

one hundred twenty million dollars. This share was deposited in a special account in the Treasury and is being held there, delivery to Interhandel having been delayed by the terms of the settlement and by this law suit.

Our appellants, Wally Kelberine and Lenka Berlin, two individuals, filed this civil action on March 16, 1965, the day before the delivery of the Aniline stock pursuant to the sale at auction. In their complaint they say they suffered under the Nazi conspiracy in Europe and that they are now, although they were not at the time of their loss and damage, citizens of the United States. They say they bring the action on behalf of all persons similarly situated, too numerous to bring before the court. They say the Attorney General and the Secretary of the Treasury intend to deliver to Interhandel the $120,000,000 proceeds from the sale. They further say that between 1933 and 1945 a number of men and corporations in Europe acted in a gigantic conspirary (referred to as the "Nazi Conspiracy") in the course of which they illegally seized the property of plaintiffs and of the class they represent, and that they (meaning the conspirators) enforced slave labor upon plaintiffs and killed members of the families of plaintiffs. They further allege that I. G. Farbenindustrie, a corporation, was an integral part of the Nazi conspiracy, participated in it, and profited from it, and has been declared officially by the United States Government to have been an integral part of that conspiracy. They say that Interhandel was a creature of Farbenindustrie and that it is and should be fully accountable and liable to the extent of the assets within the United States and to the extent of the losses and damages of the plaintiffs at the hands of the Nazi conspiracy. Plaintiffs say that the seizures, etc., were illegal under the valid laws of the states concerned and that the claims of plaintiffs rest further upon inherent natural law. They

say the class they represent exceeds two hundred thousand persons.

Plaintiffs pray that the Attorney General and the Secretary be enjoined from paying to Interhandel any part of the $120,000,000, that plaintiffs as a class be adjudicated as having "the right to said $123,000,000 in funds", and "That upon the individual proof of claim by the Plaintiffs to a master or masters appointed by this Court, the Plaintiffs individually pro rata and equitably be paid said funds upon their adjudicated claims."

The Government defendants moved to dismiss on the grounds that, as to them, the court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted. Defendant Interhandel moved to dismiss "and/or" to quash the summons on the grounds that it was not subject to process in the District and that it had not been properly served. Plaintiffs proceeded to take depositions in pursuit of discovery. The motions were set for hearing April 9, 1965. Plaintiffs moved to continue them generally. The court granted the Government defendants' motion to dismiss and continued Interhandel's motion, setting it for hearing on April 29th. Plaintiffs took further depositions and moved to continue the hearing on the motion to a still later date to permit them to explore further certain phases of discovery. The court denied the motion to continue and granted Interhandel's motion to dismiss and to quash service of process. This appeal followed.

I

Did the District Court err in refusing to continue consideration of the motions to dismiss pending the further taking of depositions by plaintiffs? The subject of the depositions, so far as is indicated, was the doing of business by Interhandel in the District of Columbia. Plaintiff had one continuance of twenty days and had taken

several depositions directed to this subject. Interhandel claimed the subject had been covered exhaustively. The court sought a proffer from counsel for plaintiffs, pointing out that plaintiffs said the only business of Interhandel was fronting for Farben and owning the stock of General Aniline. Upon that basis the court thought the evidence already taken was enough. Plaintiffs said that by taking the further depositions they would have "a more comprehensive and complete view". We think the court was correct, and in any event the matter was primarily in its discretion.

II

Did the court err when it quashed the service? We think it did. The District of Columbia statute[5] provides that the District Court here shall have cognizance "of all cases in law and equity between parties, both or either of which shall be resident or be found within said district". Interhandel came into the District to file a civil action concerning its property. It continued to prosecute that action. It appointed and maintained here an attorney in fact, who was authorized to accept service of all notices and process on its behalf for such proceedings between it and the Attorney General and "Treasurer of the United States" as may be necessary to the enforcement of the stipulation of settlement of the pending civil action and of any judgment entered in that action; and for no other purpose whatever. We think the institution and prosecution of a civil action in the court here clearly establishes the presence of the corporation here. It voluntarily subjected itself to the jurisdiction of the court; it could not do so *in absentia*. So we think Interhandel was clearly found here.[6]

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[5] D.C. CODE § 11-306 (1961 ed.).

[6] The "found" feature of this statute was discussed briefly by the Supreme Court in Graham v. Brotherhood of Firemen, 338 U.S. 232, 236 (1949).

Interhandel says appellants' contentions on this point fail because it has never transacted business here. It says Congress defined "doing business" when it exempted from license requirements corporations which merely prosecute litigation.[7] The statute does not read as Interhandel reads it. It exempts these corporations from the necessity of getting a license, but it notably does not say they are not doing business. Furthermore the liability of a foreign corporation to suit here does not depend upon its doing business here; it depends upon its being found here.

The corporation being found here and therefore subject to suit here, the next question concerns service of process: Upon whom could service be had? We think service upon the agent resident in the District was valid. His expressed authority was limited, to be sure. But it covered the law suit respecting the Interhandel property; he was empowered to accept service "for such proceedings between the parties to this Stipulation as may be necessary to the interpretation or enforcement, or both, of this Stipulation". The case at bar certainly involved the enforcement of the stipulation; indeed it sought to prevent that enforcement. It is true that proceeding was not between the parties to the stipulation, but all of those parties were parties to this suit. It could quite properly be held that process in this case fell within the agent's express authority. But we do not rest upon that power of attorney. We think that under the total circumstances of the case the agent of the corporation present in the District for the purpose of conducting the litigation in the courts here was subject to process in this suit. The statute says[8] that service may be made on a non-resident corporation by service

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[7] D.C. CODE § 29-933(b) (1961 ed.).

[8] D.C. CODE § 29-933i(a) (1961 ed.).

thereof on "the registered agent", but it also provides[9] that nothing therein shall limit the right to serve process "in any other manner now or hereafter permitted by law." We are of opinion that, a foreign corporation being present in the District, its agent duly authorized to do the tasks for which it is present here may be served with process in its behalf in an action reasonably within the ambit of those tasks.[10]

We intend this ruling to be no broader than the case. We hold that, if a foreign corporation comes into the District of Columbia for the purpose of filing and prosecuting in the District Court a suit concerning certain property, it cannot, by restricting the authority of its resident agent, immunize itself against suit in that same court involving that same property.

It is suggested that since, as appears in a moment, we affirm the dismissal of the complaint, the dispute concerning the service of process is moot and ought not to be decided. But, on the other hand, if Interhandel was not susceptible to process in the District, the nature of the complaint, valid *vel non*, was immaterial. Thus we think decision upon the service-of-process point is an integral first step in the resolution of the controversy. Had we decided Interhandel was not subject to suit, there would have been an end to the matter. But, since we hold Interhandel to have been subject to suit and correctly served, we pass on to the problem of the dismissal of the complaint.

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[9] *Id.*, § 29-933i(c).

[10] See the discussions by the Supreme Court in Hansom v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

III

Did the court err in dismissing the action against the Government officers? We think it did not.

Pending in the court here was a civil action by Interhandel against the Attorney General concerning properties vested in him by virtue of a federal statute. The President, by a memorandum dated January 8, 1963, and under authority vested in him by statute,[11] determined that the interest of the United States required the sale of this property. The Attorney General had power to settle the litigation.[12] He settled it. One of the terms of the stipulation of settlement was that the funds would be held by the United States as security for the performance by Interhandel of certain indemnity obligations imposed upon it by the agreement. (Sec. VIII(4).) Those obligations (Sec. IX(2)) were that Interhandel would hold harmless the United States and its officers and employees from any claim made relating to actions described in certain paragraphs of the stipulation, or resulting from compliance by any officer of the United States with the stipulation, and from any claim made relating to the control or operation of the General Aniline and Film Corporation by Interhandel, or any of its stockholders, or persons under its control, or successors to such persons. Further, Interhandel agreed (Sec. IX(2)) to indemnify the United States and its officers and employees from any claims brought by the Government of the Netherlands on behalf of itself or its political subdivisions, Interhandel or persons under its control, or any Dutch national person, in respect to the properties subject to the stipula-

[11] Pub. L. No. 87-846, § 203, 76 STAT. 1113 (1962).

[12] Halbach v. Bumsted, 207 F.2d 503 (3d Cir. 1953), *cert. denied sub nom.* Bumsted v. Markham, 347 U.S. 933 (1954); Standard Oil Oil Co. v. Clark, 163 F.2d 917 (2d Cir. 1947), *cert. denied*, 333 U.S. 873 (1948); Castell v. United States, 98 F.2d 88 (2d Cir.), *cert. denied*, 305 U.S. 652 (1938).

tion. The stipulation provided that the United States could recover sums due by reason of the indemnities either by payment or by cancellation of the securities in which the properties were invested. And it provided (Sec. VIII(4)) that redemptions of these properties for Interhandel could be made from time to time as the Attorney General determines that such securities are no longer needed to secure the performance by Interhandel of its indemnity obligations. Thus it is amply clear that the United States has an interest in these securities and that its officers are performing official duties involving judgment and discretion, not mere ministerial chores. The action was to require these officers to turn over to plaintiffs these securities and also to prevent them from carrying out the obligations of the stipulation of settlement. Thus the action is against the United States, which has not consented to it. It was correctly dismissed.

Plaintiffs cite and rely upon *Mellon* v. *Orinoco Iron Co.*[13] and *Houston* v. *Ormes.*[14] None of the criteria listed in those cases as premises for exceptions to the general rule respecting unconsented-to suits against the United States are present in the case at bar.[15]

Moreover (although the point is immaterial in view of the foregoing) plaintiffs specifically and expressly asserted to the trial court that they claim no equitable lien upon the funds being held in the Interhandel account. Thus they are in the position of persons merely interested in the common good and, under the doctrine of *Massachusetts* v. *Mellon,*[16] have no standing to sue.

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[13] 266 U.S. 113 (1924).

[14] 252 U.S. 469 (1920).

[15] And see Smith v. Harrah, 60 App. D.C. 258, 51 F.2d 314 (1931), and McCormack v. Harrah (a companion case), 60 App. D.C. 260, 51 F.2d 316 (1931).

[16] 262 U.S. 447 (1923).

IV

Did the court err when it dismissed the complaint? We think it did not.

The thesis of the action is easily recognized from the outline we have given of the complaint. Interhandel is a creature of Farben. Farben was a part of the Nazi conspiracy of 1933-45. The Nazi conspiracy, in violation of the laws of the several states involved and of natural law, damaged these two plaintiffs and others, to a number of some two hundred thousand, destroying their property, killing their relatives, and reducing them to slave labor. Therefore all the property of Interhandel should be awarded by American courts to these plaintiffs, pro rata. We are of opinion the thesis is not presently susceptible of judicial implementation. It may be that the Congress might enact a program and a procedure by which the objectives prayed for could be achieved. But we think the courts alone cannot do it. As presently framed, the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States. The premises for these conclusions are many and easily seen. The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasors is too indefinite. The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

The complaint prays, as we have noted, that all the Interhandel funds be divided "pro rata and equitably" among the participating petitioners. If only the present two participate, they would receive sixty million dollars apiece. If

the entire potential two hundred thousand damaged persons entered the proceeding, each would receive six hundred dollars. This method of award would be a novelty to us. The events, the witnesses, the guilty tort feasors, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support. The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation. It seems to us that the trial court correctly dismissed the action for failure to state a claim upon which relief can be granted.

Affirmed.

APPENDIX B

U. S. Constitution, Amendment V

"No person . . . shall be deprived of . . . property, without due process of law; . . ."

Trading With The Enemy Act, Sec. 9(a)

". . . *Provided further,* That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead . . ."

Pub. L. 87-846, Title II, §203, 76 Stat. 1113, 50 App. U.S.C., § 9(a).